Filed 10/19/09 In re S.K. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re S.K., a Person Coming Under the Juvenile Court Law.	B208577 (Los Angeles County Super. Ct. No. JJ15735)
THE PEOPLE, Plaintiff and Respondent, v. S.K., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Ambrose, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

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The juvenile court found that S.K. (minor) committed misdemeanor battery on a school employee (Pen. Code, § 243.6).[1] The juvenile court declared minor a ward of the court (Welf. & Inst. Code, § 602), imposed a one-year maximum period of confinement, and placed him home on probation. On appeal, minor contends: (1) an extrajudicial identification process irreparably tainted the victim's identification in court; and (2) the juvenile court denied minor the opportunity to confront and cross-examine a witness against him. Finding no merit to minor's contentions, we affirm.

FACTS AND PROCEDURE

On October 12, 2007, in the morning, Kathryne Berlin (Berlin), a middle school teacher, was standing outside her classroom taking attendance.[2] Someone approached Berlin from behind, slapped her buttocks, and ran away. On the same day, in the afternoon, Berlin was again standing outside her classroom taking attendance. Someone approached her from behind and slapped her buttocks. As the person began to run away, Berlin shouted at him to stop. The person turned around and shouted back at her. She saw the person's face for two to three seconds from a distance of five to six feet.[3] She also observed that the person was wearing a school uniform. J.G., a student from her afternoon class, witnessed the incident and told Berlin the name of the individual who slapped her.

Three days later, Berlin spoke to Carl Loos, a peace officer who worked at the middle school. Loos gave her a school yearbook to assist her in identifying the person

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1 All further statutory references are the Penal Code unless otherwise indicated.

2 Appellant's opening brief cites January 13, 2008, as the date the underlying offense occurred. We assume this date comes from one of the prosecutor's questions, wherein he erroneously asked Berlin to describe the events of January 13, 2008. The Welfare and Institutions Code section 602 petition, however, cites October 12, 2007, as the date when the offense occurred and we see nothing in the record to dispute this.

3 Berlin testified that several days before these two incidents, she was also slapped on the buttocks. She did not see who slapped her on that occasion.

who slapped her. The yearbook contained a photograph of each student at the middle school along with his or her name printed underneath the photograph. After reviewing the yearbook for 10 to 20 minutes, Berlin selected minor's photograph in the yearbook and told Loos that minor was the person who slapped her buttocks.

Los Angeles Police Department Officer Juan Gonzalez conducted a *Gladys R.*[4] interview on minor and informed minor of his *Miranda* rights.[5] After waiving his *Miranda* rights, minor denied slapping Berlin on the buttocks and maintained that Berlin confused him with another student. Officer Gonzalez characterized minor's demeanor during the interview as calm and cooperative.

At the adjudication hearing, Berlin identified minor as the person who slapped her buttocks.

The juvenile court found beyond a reasonable doubt that minor committed misdemeanor battery on Berlin, a school employee. It declared minor a ward of the court, imposed a maximum confinement period of one year, and placed minor on probation at home. Minor timely appealed from the trial court's orders.

DISCUSSION

I. Identification

A. Minor's Contention

Minor contends the process of identifying him through the yearbook was unduly suggestive because the yearbook photographs had corresponding names, and Berlin already had a name in mind (i.e., the name given by her student J.G.) when she viewed the photographs. According to minor, because the identification process was flawed, Berlin's subsequent identification of minor at the adjudication hearing was irreparably tainted and should have been excluded.

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4 *In re Gladys R.* (1970) 1 Cal.3d 855.

5 *Miranda v. Arizona* (1966) 384 U.S. 436.

B. Relevant Authority

"'In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) "whether the identification procedure was unduly suggestive and unnecessary," and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. [Citation].'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 366-367 (*Carpenter*).) The circumstances relevant to the latter inquiry include "such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216, superseded by statute in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) Even if an identification process is unduly suggestive and unnecessary, if a witness's identification is nevertheless reliable based on the factors cited above, then the identification is constitutionally sound. (*People v. Johnson*, *supra*, at p. 1216.)

The applicable standard of review is de novo. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609 (*Kennedy*).)

C. Analysis

As a threshold matter, we note that minor did not object to Berlin's identification testimony at the adjudication hearing. Thus, minor has forfeited this issue and is precluded from raising it on appeal. (*People v. Torres* (1971) 19 Cal.App.3d 724, 732 ["Failure to raise the identification issue in the trial court by objection or motion to strike, precludes appellant from asserting the issue on appeal"].)

Forfeiture aside, we conclude that minor's argument fails because Berlin's identification "'was nevertheless reliable under the totality of circumstances'" based on the factors cited above. (*Carpenter, supra,* 15 Cal.4th at pp. 366-367.) First, Berlin had ample opportunity to view minor at the time of the offense. She testified that she saw minor's face for two to three seconds from a distance of five to six feet. (See *Kennedy, supra,* 36 Cal.4th at p. 611 [evidence that witness saw assailant from five to

10 feet militated in favor of reliability].) Second, Berlin's degree of attention to minor was sufficiently detailed. She testified that she "[got] a good look at him" and described him to the school's peace officer as "a black male, about 4'10," [and having a] dark complexion." Third, we find nothing in the record to dispute the accuracy of Berlin's initial description to the peace officer. Fourth, Berlin did not equivocate in her identification of minor after viewing the yearbook, or in her identification of minor at the adjudication hearing. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [whether victim equivocates during identification is one factor in determining reliability].) Fifth, just three days had elapsed between the offense and the yearbook identification. (*Kennedy*, *supra*, 36 Cal.4th at p. 611 [evidence "that the length of time between the crime and the identification was *only* three weeks" militated in favor of reliability (italics added)].)

In sum, we reject minor's challenge to Berlin's identification because it was not raised below and in any event, the identification was reliable under the totality of circumstances.

II. Confrontation

A. Minor's Contention

Minor contends that J.G.'s disclosure of minor's name to Berlin was testimonial in nature and thus he was entitled to confront and cross-examine J.G. under the Sixth Amendment.

B. Relevant Authority

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the Supreme Court held that under the Sixth Amendment's Confrontation Clause "[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Crawford*, *supra*, at p. 59.) The Supreme Court declined to "spell out a comprehensive definition of 'testimonial,'" but noted that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern

practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Id.* at p. 68.)

Our Supreme Court has identified some "basic principles" courts should use in determining whether an out-of-court statement is testimonial. These include whether the statement "occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony," whether the statement was "given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial," and whether the statement's "primary purpose . . . is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984 citing *Davis v. Washington* (2006) 547 U.S. 813, 829.) "[T]he primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation." (*People v. Cage*, *supra,* at p. 984.)

C. Analysis[6]

In our view, J.G.'s disclosure of minor's name to Berlin was not testimonial in nature. The formality and solemnity characteristic of in-court testimony was utterly lacking in this case. J.G. disclosed minor's name to Berlin after J.G. saw minor slap Berlin's buttocks. At the time, Berlin had not informed the school's peace officer of the incident and there was certainly no formal inquiry in place. Moreover, there was nothing about the apparent circumstances at the time J.G. made her statement to Berlin—i.e., after a seemingly innocuous slap on the buttocks—that would suggest the statement would be primarily for the purpose of establishing some fact at a future criminal trial, or that J.G. would be subject to criminal prosecution for not telling the truth.

Moreover, even if the statement was testimonial and its admission was erroneous, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Berlin testified that she saw minor for two to three seconds from a distance of five to six feet, and her identification of minor at the adjudication hearing was unequivocal. Her in-court identification of minor as the perpetrator was

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6 As a threshold matter, we note there is some ambiguity as to whether minor properly preserved this issue below. Evidence that J.G. disclosed minor's name to Berlin arose during the *defense's* examination of Officer Gonzalez, and there was no objection by the defense to the evidence. It was only during his closing argument that defense counsel maintained "the People failed to bring in a key witness [J.G.]." The juvenile court responded: "Don't you think the key witness is the victim?" Defense counsel insisted that Berlin had *not* seen minor and accused the court of already deciding the case. After that exchange, defense counsel went on to finish her closing argument, the prosecutor gave her closing argument, and the juvenile court announced its findings. Because minor contends he suffered a deprivation of constitutional rights, we will address his challenge on the merits.

Additionally, the People argue that minor is precluded from raising this issue on appeal because it was minor, and not the prosecution, who introduced evidence that J.G. had disclosed minor's name to Berlin. We need not reach that issue because we conclude there was no error, and if there was error, it was harmless.

not at all dependent on J.G.'s disclosure of minor's name. Thus, even if minor had been able to cross-examine J.G. and adduce some evidence of J.G.'s uncertainty or bias, such evidence would have had no impact on the credibility of Berlin or the certainty of her identification. Thus, any error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ